

- (1) She had no previous conviction.
- (2) She is about 50 years old and has six small children (all in Court) to look after.
- (3) In addition, her husband is an opium addict, sickly and has been dependent on her.
- (4) There has been an absence of such case in the district for quite some time.

I will deal with the first reason last. The second reason is one which naturally raised the sympathy of the Court but apart from the age of the accused it mentions none of the reasons referred to in section 173A of the Criminal Procedure Code which authorises the Court to act as it did. So far as the age of the accused is concerned I have seen her and I am of opinion that it is impossible to say that on account of her age it is inexpedient to inflict upon her any punishment. As to the third and fourth reasons given by the Magistrate for his action, it is perfectly clear that neither can amount to a valid reason for making an order under section 173A without proceeding to record a conviction. So far as the first reason is concerned, presumably the learned Magistrate, in recording that the accused had no previous conviction, was paying regard to the character of the accused. Whether or not the absence of a previous conviction, more particularly in a case in which the accused has pleaded guilty to a charge of bribery, is sufficient for a Magistrate to act under section 173A of the Criminal Procedure Code is not necessary for me to decide in this case. So far as this case is concerned the Legislative authority has laid it down that an accused person charged with an offence such as that alleged in the first charge shall be sent to prison for a period of not less than one year. If the Legislative authority had wished to say that such a person should not be sent to prison for this minimum period if he or she had no previous conviction, the Legislative authority would have so stated. Whilst I have every sympathy with the domestic circumstances of the accused person, I find it impossible to allow myself to be influenced by them. During the period of this Emergency the Executive and the Legislature alone can be fully aware of the reasons which make extraordinary legislation necessary. Judges and Magistrates are not in a position and are not entitled to query such legislation unless it can be found to be *ultra vires*. In these circumstances, the order of the learned Magistrate is quashed so far as the first charge is concerned, the sureties of the accused are discharged and I impose a sentence of one year's rigorous imprisonment and not simple imprisonment. This means that

she will not remain idle in prison but will do such prison labour as she is capable of doing, and I have no reason to believe that any such labour will be injurious, though that is of course a matter for the Prison Medical Officer.

Order accordingly.

OOI PHEE KEAT v. KOK YOON SAN.

[Orig. Civ. Juris. (Wilson, J.) March 31, 1952]

[Kuala Lumpur — Civil Suit No. 182 of 1951]

Debtor and Creditor (Occupation Period) Ordinance, 1948 — Contract — Money lent during Japanese occupation on an I.O.U. endorsed: "In British or Allied Currency" — Admissibility of I.O.U. as proof of agreement — "In British or Allied Currency" — Construction of — Emergency (Finance) Regulations, 1939.

In 1944, while Malaya was under Japanese occupation, Lee, being in need of money, approached Ooi through a third party for a loan of \$25,000. Lee gave an I.O.U. for that amount and endorsed on it "In British or Allied currency." On a suit brought by the personal representative of Ooi against the personal representative of Lee the defence raised that: (1) Under section 92 of the Evidence Ordinance 1950, as the I.O.U. was tendered in evidence no evidence could be given of any agreement that the loan was to be repaid dollar for dollar after the occupation; (2) If the loan was in fact made it must be revalued under section 6 of the Debtor and Creditor (Occupation Period) Ordinance, 1948; (3) The agreement was void for uncertainty in the phrase "In British or Allied currency"; (4) In any case the whole transaction was illegal being prohibited under regulation 3 of the Emergency (Finance) Regulations, 1939.

Held, that (1) following *Ooi Phee Cheng v. Kok Yoon San*⁽¹⁾, an I.O.U. though neither a promissory note nor a written agreement may be sufficient note or memorandum in writing to prove the existence of an agreement; (2) as the debt was expressly made payable otherwise than in occupation currency no revaluation was necessary; (3) "In British or Allied currency" means in such currency as might be established in Malaya after the period of occupation was ended, whether the re-occupying Power be British or an ally of Great Britain; (4) the Emergency (Finance) Regulations, 1939 were special regulations made by the British authorities in time of war to assist the British Empire and her allies in the war against their enemies and it cannot be said that such regulations can be held to have been in force during the period of occupation by an enemy Power.

Cases referred to:—

- (1) *Ooi Phee Cheng v. Kok Yoon San* (1950) M.L.J. 187.
- (2) *In re Garnett, Gandy v. Macaulay* (1886), 31 Ch. D. 16.
- (3) *Mills v. Dunham* (1891) 1 Ch. D. 576.
- (4) *Rannie v. Irvine* 7 Man. & G. 978.
- (5) *Boissevain v. Weil* (1950) A.C. 327; (1950) 1 All E.R. 728.

CIVIL SUIT.

N. A. Majoribanks and *Gould* for the plaintiff.
H. T. Ong for the defendant.

Cur. Adv. Vult.

Wilson, J. :— The plaintiff is the executor and trustee of the estate of Ooi Phee Hin, deceased. The defendant is the executor of the will of Lee Tuck Onn, also deceased. In the plaint it is alleged that Ooi Phee Hin lent to the said Lee Tuck Onn the sum of \$25,000 in occupation currency on the 25th November, 1944, and it is also alleged that Lee Tuck Onn promised to repay the sum after the country was liberated and in the currency then established whether British or some other Allied currency. The plaintiff claims a sum of \$25,000. In his defence the defendant states that he has no knowledge of these allegations contained in the plaint and requires strict proof thereof.

In these circumstances I propose to start by setting out the facts which I find to have been proved. The alleged transaction was not completed between Ooi Phee Hin and Lee Tuck Onn in person but, according to the evidence, one Dr. Che Lah acted as a go-between and in fact acted both as the agent of Lee Tuck Onn and the agent of Ooi Phee Hin. Lee Tuck Onn was a gentleman of means but for reasons which it is not necessary to set out here he found himself short of cash in November, 1944 and asked Dr. Che Lah to raise a loan of \$25,000 for him. This is the evidence of Dr. Che Lah which I accept in toto. Dr. Che Lah at first tried to put him off but he saw Lee Tuck Onn again the next day and the latter insisted that he should raise a loan for him. Dr. Che Lah asked him how he would repay and Lee Tuck Onn replied that he could not repay during the occupation period as there was no money coming from his estate. He said he would repay after the occupation period and he said he would pay back what he owed dollar for dollar after the occupation. Mr. Ong submitted that this last piece of evidence was inadmissible by reason of section 92 of the Evidence Ordinance, 1950.

In *Ooi Phee Cheng v. Kok Yoon San*⁽¹⁾, Taylor, J., observed "an I.O.U. is not a promissory note nor is it a written agreement, though it may be a sufficient note or memorandum in writing to prove the existence of an agreement. Ordinarily an I.O.U. is merely a written acknowledgment of an existing liability but it may be evidence from which an

undertaking to pay will be implied." In my opinion the evidence is admissible and I so hold. Thereupon Dr. Che Lah went to Kuala Lumpur and got in touch with Ooi Phee Hin. He says he explained to him the requirements of Lee Tuck Onn and the terms on which payment was to be made. That is a most important factor in this case because it follows that Ooi Phee Hin was told that if he lent this money in occupation currency it would be repaid dollar for dollar after the occupation. Ooi Phee Hin agreed to lend the money on these terms and two days later handed to Dr. Che Lah \$25,000 and a blank I.O.U. Dr. Che Lah handed the money and the I.O.U. to Lee Tuck Onn. The latter filled up the I.O.U. form and signed it and endorsed it "In British or Allied currency" and he signed the endorsement. The I.O.U. was also signed by Dr. Che Lah as a witness. Those are the facts which I find to have been proved.

The next point taken by Mr. Ong is that if this loan was in fact made it must now be revalued under section 6 of the Debtor and Creditor (Occupation Period) Ordinance, 1948. That section, however, does not apply if the debt was expressly made payable otherwise than in occupation currency, which it clearly was in this case. Therefore, in my opinion, the debt does not qualify for revaluation under the Ordinance.

In the case of *In re Garnett, Grandy v. Macaulay*⁽²⁾ Lord Justice Cotton made the following observation :—

"Undoubtedly one looks with suspicion in some cases on claims which are brought forward after the death of the person against whom claims are made, when they might have been brought forward before."

Mr. Ong has referred to that case to support the contention that this case must be scrutinised with great care. It is to be noted that Cotton, L.J., used the expression "in some cases" and I doubt its application to the facts of this case. But in any case I have given the matter much consideration and have come to the conclusion, as already stated, that I must accept the evidence of Dr. Che Lah in toto.

Mr. Ong also maintained that the parties were not *ad idem*. I am unable to agree with this contention. It appears to me that they were definitely *ad idem* and that Ooi Phee Hin knew before he lent the money that Lee Tuck Onn was proposing to repay the loan dollar for dollar.

The next point for consideration is what is meant by the expression "In British or Allied currency." I am aware of course that where the intention of the parties is not sufficiently clear the Court will not

make a contract for them in order to prevent the whole agreement from being void on the ground of uncertainty or otherwise. It therefore becomes necessary to consider whether the intention of the parties is sufficiently clear and, in other words, what was meant by the expression "In British or Allied currency." In the case of *Mills v. Dunham*⁽³⁾, Chitty, J., referring at page 580 to a clause in an agreement, stated as follows :—

"There is no occasion for me to read these words with such minute exactness as shall not give effect to the intentions of the parties; I must read them reasonably, and I think I am reading them in a way that commends itself to good sense, and in conformity with the observations of Maule, J., in *Rannie v. Irvine*⁽⁴⁾ 'that a covenant of this kind must have a reasonable construction', by reading them in the way that I have just read them."

On this principle it seems to me that the meaning of the words "In British or Allied currency" are quite clear and that the words mean in such currency as might be established in Malaya after the occupation was ended by the reoccupying power whether that power should turn out to be British or an ally of Great Britain. In point of fact the currency introduced by the British after the reoccupation is the currency now in circulation, and which originally it appears on the face of the notes was issued in 1941.

Next, it has been argued that the whole transaction was illegal in as much as it was prohibited under Regulation 3 of the Emergency (Finance) Regulations, 1939, and in as much as he contends these Regulations were in force during the occupation period. If that is so, I would agree that the transaction was illegal and that this claim must fail. In support of this part of his argument he has referred to the case of *Boissevain v. Weil*⁽⁵⁾. In that case a British subject, involuntarily resident in enemy occupied territory, borrowed foreign currency from a Dutch subject, likewise so resident, and it was held that the sums were irrecoverable on the ground that it was contrary to Regulation 2 of the Finance Regulations, 1939 and the Regulation applied to British subjects for the time being in enemy territory. The reason for this was section 3(1) of the Emergency Powers Defence Act, 1939, which made it imperative that the Defence Regulations should be construed as applying to all British subjects. In this

case, however, there is no evidence that the two Chinese gentlemen who completed this transaction were British subjects. Furthermore, I can find nothing in the Regulation, or in the Emergency Regulations Enactment under which they were made, which applies the Regulations to all British subjects. Mr. Ong contends that the Finance Regulations were not repealed until the enactment of Ordinance No. 10 of 1948. There is no evidence that they were ever suspended or repealed by the occupation power specifically. He has referred to the fifth edition of *Oppenheim*, Volume II page 349 and page 350 where it is stated that Article 43 of the Hague Regulations provides that the occupant must respect, unless absolutely prevented, the laws in force in the country. No doubt that applies to the general law of the country. The question is whether it applies to these particular Regulations. If it does, it seems to me that the Japanese authorities during the occupation would have had to have enforced the Finance Regulations and enforce it against all persons and on the basis that Japanese currency was foreign currency. This would appear to me to be an extraordinary result. I have come to the conclusion that it cannot be successfully maintained that special regulations made by the British authorities in time of war to assist the British Empire and her allies in the war against their enemies, including the occupation power of a particular country, can be held to have been in force during the period of the occupation.

Finally, Mr. Ong has urged that the defendant is entitled to relief under the provisions of the Usurious Loans Enactment. No question of the payment of interest on the loan arises in this case and in my opinion the Enactment is not applicable.

In short, I find that the loan was made, that it does not come within section 6 of the Debtor and Creditor (Occupation Period) Ordinance, 1948 and that Lee Tuck Onn was in such need of money at the time of the transaction that he was perfectly prepared to undertake to repay the loan after the occupation on a dollar for dollar basis and that Ooi Phee Hin made the loan on that basis. I give judgment for the plaintiff as prayed.

Judgment for the plaintiff.

LOH SEK NGEЕ v. PUBLIC PROSECUTOR.

[Court of Appeal (Mathew, C.J., Pretheroe and
Wilson, JJ.) Kuala Lumpur, February 4, 1952]

*Emergency Regulations, 1948 — Regulation 4(1)(a)
and (b) — Carrying arms — Sentence of death — Right
of appeal.*

The appellant in this case was convicted, on his own plea, of three offences, (1) carrying a revolver contrary to Regulation 4(1) (a) of the Emergency Regulations, (2) possession of six rounds of ammunition contrary to Regulation 4(1)(b), and (3) possession of a hand grenade contrary to Regulation 4(1)(b). The learned trial Judge sentenced the accused to death on the first charge and deferred sentence on the other two charges. The point for determination was whether the appellant had a right of appeal to the Court of Appeal.

Held, that a convicted person has a right of appeal to the Court of Appeal against sentence even though the only sentence provided by law is death.

CRIMINAL APPEAL.

The Judgment of the Court of Appeal was delivered by:—

Mathew, C.J. :—The appellant in this case was convicted, on his own plea, of three offences, (1) carrying a revolver contrary to Regulation 4(1) (a) of the Emergency Regulations, (2) possession of six rounds of ammunition contrary to Regulation 4(1) (b), and (3) possession of hand grenade contrary to Regulation 4(1) (b). The learned trial Judge sentenced the accused to death on the first charge and deferred sentence on the other two charges. The first point for determination is whether the appellant has a right of appeal to this Court.

Regulation 12 of the Emergency (Criminal Trials) Regulations, 1948, requires the presiding Judge, immediately after passing sentence in an Emergency Procedure case, to ask the convicted person if he wishes to appeal against his conviction or sentence or both, and a note of a reply to such question shall be entered in and form part of the record. Under the proviso to this regulation this procedure shall not be followed in a case where no sentence other than death is provided by law and the accused has been convicted on his own plea. This regulation is purely procedural and in no way affects the rights of a convicted person to appeal. There are no other relevant provisions regarding appeals in Emergency Procedure cases, and appeals in such cases are therefore governed by section 19 of the Courts Ordinance (No. 43 of 1948). Sub-section (2) of this section provides:—

“An appeal by a person convicted shall be either against the conviction or against the sentence or against both:

Provided that where an accused person has pleaded guilty and been convicted on such plea there shall be no appeal except as to the extent or legality of the sentence.”

In our view a convicted person has a right of appeal to the Court of Appeal against sentence even though the only sentence provided by law is death. The appellant in this case has urged in mitigation of sentence that he had assisted the Police after his arrest. These are matters which it is not competent for us to consider. The only sentence provided by law for an offence contrary to Regulation 4(1) (a) of the Emergency Regulations is death.

The appeal against sentence is dismissed.

Appeal dismissed.

PUBLIC PROSECUTOR v. GOH THOR KIAH.

[App. Crim. Juris. (Taylor, J.) February 22, 1952]

[Selangor — Criminal Appeal No. 69 of 1951]

Criminal Procedure Code (Cap. 6). s. 314 — The word “shall” appearing in s. 314(ii) — Construction of.

This was an appeal by the Public Prosecutor. The respondent in this case was charged in the Sessions Court with possession of some 20 packets of opium. He pleaded guilty and was discharged under section 173A of the Criminal Procedure Code. When the appeal first came before Taylor, J., no notice of any kind that an appeal was pending had been served on the respondent. The Public Prosecutor applied under section 314(ii) for a notice to be issued; this was done and it was returned unserved. Section 314(ii) reads:

“(ii) If the service of such last-mentioned notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence.”

The learned Deputy Public Prosecutor applied under the above sub-section for the appeal to be heard on the merits in the absence of the respondent.

Held, that originally there was no appeal by the Public Prosecutor; the Chapter was framed on the view that he would be the respondent and provision is made for the record to be transmitted to him by way of service but without being actually served. Much later, the Code was amended to permit of an appeal on the merits by the Public Prosecutor but section 314 was not amended; therefore an appeal by the Public Prosecutor cannot be heard in the absence of the respondent.

The word “shall” is construed with a qualification to avoid infringing a fundamental principle.

CRIMINAL APPEAL.

D. M. K. Grant (D.P.P.) for the appellant.

Respondent — absent, unserved.

Cur. Adv. Vult.

Taylor, J. :—This is an appeal by the Public Prosecutor against a sentence or order which he says was inadequate.

The accused was charged in the Sessions Court with possession of some twenty packets of opium. He pleaded